Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

ALTON ROMERO, M.D., and JANICE ROMERO,

Petitioners,

v.

THOMSON NEWSPAPERS (WISCONSIN), INC., THOMSON SOUTHWEST, INC., RICHARD D'AQUIN, CHARLES LENOX, MICHAEL SPEARS and DAVID HAWKINGS,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Louisiana

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether the Louisiana Supreme Court violated federal constitutional law in its interpretation of the First Amendment.

PARTIES TO THE PROCEEDINGS

The parties to these proceedings are petitioners, Dr. Alton Romero and Janice Romero, adult citizens and residents of the State of Louisiana. Respondents are Thomson Newspapers (Wisconsin), Inc., Thomson Southwest, Inc., Charles Lenox, Michael Spears and David Hawkings.

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OPINIONS BELOW

The opinion of the Fifteenth Judicial District Court, Vermilion Parish, Louisiana, denying the Respondents' Motion for Summary Judgment, is unreported and set forth in the appendix, p. 13. The judgment denying Respondents' Writ of Review by the Court of Appeal of Louisiana, Third Circuit, is unreported and set forth in the appendix, p. 16. The opinion of the Supreme Court of Louisiana, reversing the lower courts, decisions and granting summary judgment in favor of Respondents is reported at 648 So. 2d 866 (La. 1995) and set forth in the appendix, pps. 1-12.

JURISDICTION

1.

On January 17, 1995, the Supreme Court of Louisiana overruled the lower courts and granted summary judgment in favor of Respondents, dismissing Petitioners' claim with prejudice. This constitutes the final order of the Supreme Court of Louisiana with respect to this case.

2.

Jurisdiction to hear this Writ of Certiorari is conferred on this Court by 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS

The First Amendment of the United States Constitution provides in pertinent part: "Congress shall make no

law . . . abridging the freedom of speech, or of the press. . . . "

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "No state shall . . . deprive any person of life, liberty or property without due process of law."

STATEMENT OF THE CASE

A. FACTS

This is an extraordinary defamation case. The case arises from an article written by David Hawkings, and published by the *Daily Advertiser*, a newspaper in Lafayette, Louisiana. This article is set forth in the appendix at pps. 17-21. David Hawkings is a Washington reporter employed by Thomson Newspapers, which owns the *Daily Advertiser*. Thomson Newspapers (Wisconsin) Inc., Thomson Southwest, Inc., Richard D'Aquin, Charles Lenox and David Hawkings are Respondents herein. Petitioners are Alton Romero, M.D. and Janice Romero.

Prior to the events giving rise to the instant litigation, Dr. Alton Romero was an obstetrician with a thriving practice in Vermilion Parish, Louisiana. Dr. Romero, a native of Vermilion Parish, Louisiana, graduated valedictorian of Kaplan High School in 1966. Dr. Romero was an exemplary student, who was accepted into Tulane Medical School's early admissions program. Committed to the people of Vermilion Parish, Dr. Romero refused several lucrative offers and returned to his hometown of Kaplan after completing his residency in 1978. Until 1992, Dr.

Romero enjoyed the respect and admiration of the community in which he practiced, as a result of the quality health care he provided to women and children.

From 1982 until 1988, Dr. Romero practiced with a partner. This association allowed Dr. Romero's practice to grow and meet its maximum potential. However, in 1988, Dr. Romero's partner chose to relocate, and, as a result, Dr. Romero became the only obstetrician practicing at Abrom Kaplan Memorial Hospital in Kaplan, Louisiana. Dr. Romero's practice was too large for one obstetrician to manage, short of being on 24 hour call, seven (7) days a week. Thus, in 1991, Dr. Romero limited his practice to current patients with the exception of referrals for repeat Caesarean sections and uncomplicated vaginal deliveries. At the time Dr. Romero limited his practice, he was 42 years of age. Dr. Romero intended to limit his practice only until such time as another partner or associate could be hired to assist with the workload. In 1992, Dr. Romero's practice continued to be limited for the reasons cited above. Dr. Romero was only 43 years of age and had no intention of retiring from his practice for many years.

Dr. Romero's life dramatically changed on May 13, 1992, the day the *Daily Advertiser* recklessly published a libelous article and graphics labeling Abrom Kaplan Memorial Hospital and Dr. Romero as having the number one (1) Caesarean section rate in the United States.[1] The article in question implied that Dr. Romero was a butcher

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[1] The article also placed Dr. Romero in a false light before the public.

performing unnecessary Caesarean sections for convenience and economic gain. Finally, the article falsely stated that Dr. Romero was nearing retirement and that the Caesarean section rate at Abrom Kaplan Memorial Hospital was 57.5 percent. Dr. Romero and his thriving obstetrical practice were destroyed by the publication of the *Daily Advertiser* article. As a result of this publication, Dr. Romero ceased his obstetrical practice on July 1, 1992.

B. PROCEEDINGS

On August 18, 1992, Dr. and Mrs. Romero filed suit in the Fifteenth Judicial District Court of Vermilion Parish, Louisiana against Thomson Newspapers (Wisconsin) Inc., Thomson Southwest, Inc., Richard D'Aquin, Charles Lenox and David Hawkings. Petitioners later dismissed Richard D'Aquin. On March 23, 1994, a little over a month away from trial, the Respondents filed a motion for summary judgment. In response, Petitioners filed a memorandum in opposition thereto with accompanying exhibits, including deposition testimony, the newspaper article in question, and Dr. Romero's affidavit. Following extensive oral argument, the trial court indicated that in a Louisiana defamation action, the plaintiff, rather than the mover, must demonstrate at summary judgment that the plaintiff will be able to meet his or her burden at trial. The trial court found that plaintiffs had met this burden and denied Respondents' motion for summary judgment.

On April 21, 1994, Respondents sought a Writ of Review from the Louisiana Court of Appeals, Third Circuit. The state appeals court denied the writ, finding no error in the trial court's ruling. Thereafter, Respondents filed a Writ of Review and Motion to Stay with the Louisiana Supreme Court. The Louisiana Supreme Court granted Respondents' writ and stayed the trial. Oral arguments were heard on December 2, 1994.

On January 17, 1995, the Louisiana Supreme Court reversed the trial court, and granted Respondents' motion for summary judgment. The Louisiana Supreme Court held that the *Daily Advertiser* article was constitutionally protected speech on a matter of public interest and concern. The court further held that to avoid summary judgment, a plaintiff in a defamation action has the burden of showing either: (1) a false factual statement and fault on the newspaper's part or (2) a statement of opinion on a matter of public concern which reasonably implies false defamatory facts and actual malice. *Romero v. Thomson Newspapers, Inc.*, 648 So. 2d 866 (La. 1995).

Dr. Romero now petitions this Court for a Writ of Certiorari because this Court's decisions in the complex area of defamation, libel and invasion of privacy were not followed by the Louisiana Supreme Court.

REASONS FOR GRANTING PETITIONERS' WRIT

THE SUPREME COURT OF LOUISIANA ERRONEOUSLY APPLIED FEDERAL CONSTITUTIONAL LAW IN A WAY THAT CONFLICTS WITH DECISIONS OF THIS COURT.

This case demonstrates recurring and important issues in the law of defamation: 1) When does federal constitutional law apply in defamation cases; and 2) When and to what extent are states free to define their own laws in defamation cases. This issue is especially important in the instant cause as the Louisiana Supreme Court relied on federal constitutional law but erroneously applied the same in numerous respects.

It is axiomatic that the Louisiana Supreme Court's opinion adversely affected Petitioners. However, of equal importance is the effect the *Romero* opinion will have on future defamation litigation in Louisiana. Petitioners submit that the *Romero* opinion did not clarify the scope of the constitutional protection to speech. Rather, the opinion created more uncertainty in an area where clarity and certainty are vital.

I. JURISDICTION

This Court in *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), held that the Supreme Court has jurisdiction to review cases that are alleged to rest on adequate and independent state grounds when it is not clear from the state court opinion itself that the state court relied upon adequate and independent state grounds and when it fairly appears that the state court rested its decision primarily on federal law. In this regard, the *Michigan* Court stated:

> Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

Michigan, 463 U.S. at 1040-1041, 103 S.Ct. at 3476.

It is clear in *Romero*, that the Louisiana Supreme Court relied on federal constitutional law. This is evidenced early in the opinion: "[s]ince *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), the law of libel and slander has been delineated by federal constitutional law." *Romero*, 648 So. 2d at 869. Further, the court cites numerous Supreme Court cases dealing with defamation.[2] The Louisiana Supreme Court

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[2] *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990); *Anderson v. Liberty Lobbs, Inc.*, 477 U.S. 242,

does quote that portion of the Louisiana Constitution which guarantees freedom of the press, however, never expresses reliance on the same.

As in the instant cause, the state court in *Michigan*, referred to its state constitution but otherwise relied on federal law. Petitioners contend that the Louisiana Supreme Court, in the case *subjudice*, relied on federal law. However, at a minimum, the *Romero* decision was interwoven with federal law. The adequacy and independence of any possible state law grounds are not clear from the face of the *Romero* opinion. Further, the Louisiana Supreme Court's decision did not indicate **clearly** and **expressively** that it was alternatively based on bona fide separate, adequate, and independent grounds. *Michigan*, 463 U.S. at 1041, 103 S.Ct. at 3476. Thus, this Court has jurisdiction over this matter and should review the Louisiana Supreme Court's decision in order to preserve the integrity of federal law. In this regard, this Court has stated:

> It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. But it is equally important that ambiguous or obscure adjudications by state

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106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 784 (1986); *Dun & Bradstreet, Inc. v. Greenmoss*, 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 88 S.Ct. 197, 19 L.Ed.2d 1094 (1967); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); and *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

> courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action.

Id., citing *Minnesota v. National Tea Co.*, 309 U.S. 551, 557, 60 S.Ct. 676, 679, 84 L.Ed. 20 (1940).

II. THE LOUISIANA SUPREME COURT ERRONEOUSLY APPLIED FEDERAL CONSTITUTIONAL LAW.

As previously set forth, the Louisiana Supreme Court relied on federal constitutional law in *Romero v. Thomson Newspapers*. Surprisingly, the court erroneously applied federal constitutional law in the following respects:

A. The Louisiana Supreme Court cited *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) and *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967) for the proposition that a public official or figure must prove that a false statement was made with actual malice to recover for defamation. Petitioners do not disagree with the *New York Times* standard set forth by the Louisiana Supreme Court. However, the Louisiana Supreme Court determined that "Dr. Romero was a private figure, practicing his profession without media attention or notoriety. However, the question of vaginal delivery versus Caesarean section delivery is a matter of national debate and a question of great public interest and concern." *Romero*, 648 So. 2d at 870. Therefore, the *New York Times* standard evidently was, but should not have been applied by the Louisiana Supreme Court. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1,

110 S. Ct. 2695, 111 L.Ed.2d 1 (1990); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 787 (1974).

B. The Louisiana Supreme Court cited *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971) for the proposition that "there is authority for applying the *New York Times* rule when an article concerns public issues, even though the plaintiff is a private person." *Romero*, 648 So. 2d at 869. It is without question, that this Court in *Gertz* and *Milkovich* dispelled any notion that the *New York Times* standard should apply when an article concerns public issues and the plaintiff is a private person. Thus, the Louisiana Supreme Court's reliance on *Rosenbloom* is misplaced.

C. The Louisiana Supreme Court quoted *Milkovich*: "a statement of opinion relating to matters of public concern which does not contain a provably false connotation will receive full constitutional protection." *Romero*, 648 So. 2d at 870, citing *Milkovich*, 97 U.S. at 20, 110 S.Ct. at 2706, 111 L.Ed.2d at 18. However, the Louisiana Supreme Court completely ignored the heart of *Milkovich* which provides that where a statement of opinion "involves a private figure on a matter of public concern, a plaintiff must show that the false connotations were made with some level of fault as required by *Gertz*." *Milkovich*, 497 U.S. at 20-21, 110 S.Ct. at 2707. *Milkovich* confirmed that "the New York Times malice standard was inappropriate for a private person attempting to prove he was defamed on matter of public interest." *Milkovich*, 497 U.S. at 15, 110 S.Ct. at 2704, citing *Gertz v. Robert Welch, Inc., supra*.

III. THE LOUISIANA SUMMARY JUDGMENT PROCEDURE IN DEFAMATION CASES CIRCUMVENTS FEDERAL CONSTITUTIONAL LAW

As previously set forth, the Louisiana Supreme Court relied on federal constitutional law in its determination that summary judgment should be granted in the instant cause. Petitioners contend that the Louisiana Supreme Court in *Romero* attempted, but failed, to hide its erroneous application of federal constitutional law behind the cloak of state summary judgment procedure. In *Romero*, the Louisiana Supreme Court held that, to avoid summary judgment, a plaintiff in a defamation case has the burden of showing: "either (1) a false factual statement and fault on the newspaper's part (*Philadelphia Newspapers, Inc. v. Hepps*); or (2) a statement of opinion on a matter of public concern which reasonably implies false or defamatory facts and actual malice (*Mashburn v. Collin; Bussie v. Lowenthal).*" *Romero*, 648 So. 2d at 870.

The *Romero* opinion flies in the face of *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S. Ct. 2695, 111 L.Ed.2d 1 (1990), in which this Court held that a separate constitutional privilege for statements of "opinion" as opposed to "fact" does not exist. Petitioners respectfully submit that the intent of *Milkovich* was to put statements of fact and statements of opinion on equal ground as is evidenced as follows:

> . . . we think the "'breathing space'" which "'[f]reedoms of expression require in order to survive'" is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between "opinion" and fact.

Milkovich, 497 U.S. at 19, 110 S.Ct. at 2706 (citation omitted).

To avoid summary judgment in defamation cases, the Louisiana Supreme Court requires a plaintiff to prove fault when the defamatory matter involves a misstatement of facts. However, when the defamatory matter involves a statement of opinion, a Louisiana plaintiff must prove actual malice. *Romero*, 648 So. 2d at 870. This is contrary to this Court's opinion in *Milkovich* and will further confuse an already complicated area of law.

Petitioners believe that one of this Court's purposes in *Milkovich* was to prevent the unnecessary and oftentimes laborious determinations of whether defamatory matter is misstatement of fact or a statement of opinion. If the *Romero* opinion stands, there will continue to be protracted litigation regarding this issue in Louisiana as *Romero* perpetuates the artificial dichotomy between "opinion" and "fact" in direct contradiction to *Milkovich*.

Further, the Louisiana Supreme Court makes it clear in *Romero* that it does not favor defamation cases:

> Summary judgment is **favored** in defamation cases because lengthy litigation could have a chilling effect on freedom of the press.

Romero, 648 So. 2d at 870, citing, *Sassone v. Elder*, 626 So. 2d 345 (La. 1993) (emphasis added).

Evidence of the Louisiana Supreme Court's disdain for defamation cases lies in the manner defamation cases are treated at the summary judgment stage. In non-defamation cases, there is a strong preference for full trial on the merits. Summary judgment is granted only when the mover establishes that there is no genuine issue of fact and he is entitled to judgment as a matter of law. *Sassone*,

626 So. 2d at 351, citing La. Code Civ. Proc. art. 966(B). However, in defamation cases, a plaintiff, must produce evidence of sufficient quality and quantity to demonstrate that he will likely be able to meet his burden of proof at trial. *Id.*

The Louisiana Supreme Court justifies the different summary judgment standard for defamation cases by alluding to "constitutional considerations." *Sassone*, 626 So. 2d at 352. Unfortunately, the Louisiana Supreme Court's constitutional considerations are flawed. Petitioners respectfully submit that the Louisiana Supreme Court utilizes the different summary judgment standard as a method to legitimatize its circumvention of constitutional law. While confusing as to exactly what standard or burden the Louisiana Supreme Court applied in *Romero*, it is evident that the *New York Times* standard, i.e., actual malice, was applied as this is the only standard set forth in the opinion. Furthermore, the court held that actual malice is required when a statement of opinion on a matter of public concern is at issue. *Romero*, 648 So. 2d at 871.

While the Louisiana Supreme Court's reliance on *Mashburn v. Collin*, 355 So. 2d 879 (La. 1977) is misplaced in light of *Milkovich*, there is language in *Mashburn* regarding summary judgment in defamation cases which is enlightening:

> . . . when a motion for summary judgment is made and supported, the adverse party cannot rest on the allegations of his pleadings, but must set out in evidence or depositions, "specific facts showing that there is genuine issue for trial." **Moreover, if the New York Times standards**

> **may be invoked in a case, the courts must apply them in assessing the summary procedure evidence.** Accordingly, in order for a genuine issue to exist concerning the material fact of defendant's state of mind in making the alleged defamatory expression of fact or opinion, the plaintiff-opponent must show that a judge or jury reasonably could find by clear and convincing evidence that the expression of fact or opinion was made with knowing or reckless falsity.

Id. at 890 (emphasis added) (footnotes omitted).

This is essentially the standard set forth in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The *Anderson* Court stated:

> Thus, in ruling on a motion for summary judgment, the judge must view the evidence presented though the prism of the substantive evidentiary burden. This conclusion is mandated by the nature of this determination. The question here is whether a jury could reasonably find either that the plaintiff proved his case by the quality and quantity of evidence required by the governing law or that he did not. Whether a jury could reasonably find for either party, however, cannot be defined except by the criteria governing what evidence would enable the jury to find for either the plaintiff or the defendant: It makes no sense to say that a jury could reasonably find for either party without some benchmark as to what standards govern its deliberations and within what boundaries its ultimate decision must fall, and these standards and boundaries are in fact provided by the applicable evidentiary standards.

> Our holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. . . .
>
> In sum, we conclude that the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case. This is true at both the directed verdict and summary judgment stages. Consequently, where the New York Times "clear and convincing" evidence requirement applies, the trial judge's summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying the evidentiary standard could reasonably find for either the plaintiff or the defendant.

Anderson, 477 U.S. at 254-255, 106 S.Ct. at 2513-2514.

Therefore, for a plaintiff to survive a motion for summary judgment in a defamation case, this Court requires that the plaintiff present **only** evidence from which a jury might return a verdict in its favor. Although cognizant of a state's right to formulate its own procedure, Petitioners contend that the Louisiana Supreme Court has fashioned a separate dichotomy for motions for summary judgment in defamation cases as a way of circumventing federal constitutional law when it suits its

purposes. It is without question that the clear and convincing, actual malice standard, should apply at the summary judgment level when malice is the plaintiff's evidentiary burden at trial. *Anderson*, 477 U.S. 242, 106 S.Ct. 2505; *Sassone v. Elder*, 626 So. 2d 345 (La. 1993). In the instant cause, Dr. Romero is a private figure, and, thus, the *New York Times* actual malice standard should not have controlled. Petitioners submit that the Louisiana Supreme Court followed the *New York Times* standard in direct conflict with both *Gertz* and *Milkovich*.

IV. THE LOUISIANA SUPREME COURT'S OPINION DISREGARDS THE PETITIONER'S INTEREST IN THE PROTECTION OF HIS OWN GOOD NAME.

This Court in *Gertz* and *Milkovich* recognized an individual's right to protect his own good name. As stated in *Gertz*:

> The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation. Such a rule would, indeed, obviate the fear that the prospect of civil liability for injurious falsehood might dissuade a timorous press from the effective exercise of First Amendment freedoms. Yet absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation.
>
> The legitimate state interest underlying the law of libel is the compensation of individuals for

> the harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose, for, as Mr. Justice Stewart has reminded us, the individual's right to the protection of his good name
>
> > "reflects no more than our basic concept of dignity and worth of every human being – a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system."

Gertz, 418 U.S. at 341, 94 S.Ct. at 3007-3008.

The *Gertz* court specifically found that private individuals are more vulnerable to injury than public officials or figures, and are more deserving of recovery. Thus, this Court refused to extend the *New York Times* malice standard to private individuals insofar as compensatory damages are concerned. A private plaintiff seeking punitive damages must meet the *New York Times* standard, i.e., falsity or reckless disregard for the truth. *Id.* at 3010-3011. Since the State of Louisiana does not allow punitive damages, a private person in Louisiana should never be held to the *New York Times* standard.

The *Milkovich* Court applied the *Gertz* standard to statements of opinion. *Milkovich* specifically held that when a statement of opinion involves a private figure and a matter of public concern, a plaintiff must show that the

false connotations were made with some level of fault as required by *Gertz*.

The Louisiana Supreme Court does acknowledge *Gertz* to the extent that "the standard by which a negligent publisher of defamatory falsehoods is libel to a private figure plaintiff for compensatory damages is left to state law." *Romero*, 648 So. 2d at 870. Petitioners submit that this Court's intention in *Gertz* and *Milkovich* was to lower the burden of proof for a private individual in a defamation case. This is evidenced by the following language:

> This approach provides a more equitable boundary between the competing concerns involved here. It recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation. . . .
>
> Our accommodation of the competing values at stake in defamation suits by private individuals allows the States to impose liability on the publisher or broadcaster of defamatory falsehood on a **less demanding showing than that required by *New York Times***.

Gertz, 418 U.S at 347-348, 94 S.Ct. at 3010-3011 (emphasis added).

The Louisiana Supreme Court has seized upon the above cited portion of *Gertz*, but, unfortunately, failed to recognize the true intent of this Court, i.e., to lower the standard for private figure plaintiffs, to enable them to protect their own good name. By requiring Petitioners to prove their case by clear and convincing evidence at

summary judgment, the Supreme Court of Louisiana committed reversible error. The trial court carefully evaluated both respondents' and petitioners' briefs and the exhibits submitted therewith. Further, the lower court heard extensive oral arguments by both sides and brought to its decision previously gained knowledge and insight into the instant cause. The trial court found that the Petitioners would be able to meet their burden of proof at trial and denied Respondents' motion for summary judgment. In this regard the trial court stated:

> The Court is aware of the elements of libel of tort that must be proved, and obviously in a defamation by the news media suit, the constitutionally protected freedom of speech is interjected and, thus, the plaintiff instead of the mover – as the Court discerns it must produce evidence that is of sufficient quality and quantity to demonstrate that Plaintiff will be able to meet his burden of proof at the trial.
>
> Considering the offerings that have been made, together with the argument, the Court is satisfied that the position of the Plaintiff in this matter is the proper one and, therefore, the Motion for Summary Judgment is denied.

Appendix at pps. 14-15.

The Louisiana Court of Appeals, Third Circuit, denied Respondents' Writ of Review. The Louisiana Supreme Court reversed the trial court's opinion and held that Respondents were entitled to summary judgment. While an appellate court has the right and responsibility to review a lower court's decision, Petitioners contend that the Louisiana Supreme Court review of the instant matter was flawed.

In *Mashburn v. Collin*, 355 So. 2d 879 (La. 1977) the Louisiana Supreme Court stated:

> . . . when interpretation of a communication in the light of the constitutional requirements is involved, our scope of review is to examine in depth the "statements in issue" and the "circumstances under which they were made," see, *New York Times Co. v. Sullivan, supra*, 376 U.S. at 285 n. 26, 84 S.Ct. at 728, 11 L.Ed.2d at 709; *Buckley v. Littell*, 539 F. 2d 882 (2d Cir. 1976); *Davis v. Schuchat*, 166 U.S.App.D.C. 351, 354-55, 510 F. 2d 731, 735-36 (1975); *Goldwater v. Ginsberg*, 414 F. 2d 324 (2d Cir. 1969), *cert. denied* 396 U.S. 1049, 90 S.Ct. 701, 24 L.Ed.2d 695 (1970), and to "re-examine the evidentiary basis" of the lower court decision in the light of the Constitution. *Time, Inc. v. Pape*, 401 U.S. 279, 284, 91 S.Ct. 633, 636, 28 L.Ed.2d 45, 50 (1971).

Id. at 887.

The above brings to light two (2) important matters: (1) there can be no doubt that the Louisiana Supreme Court relies on federal constitutional law in the area of defamation and (2) the court in *Romero* exceeded the scope of review set out above. Had the Louisiana Supreme Court merely examined the "statements at issue" and the "circumstances under which they were made" and re-examined the "evidentiary basis of the lower court decision in light of the Constitution," it could not have reversed the trial court. It is clear that the Louisiana Supreme Court went much further than the above stated scope of review in that they made credibility

determinations, weighed the evidence and drew inferences from the facts in favor of Respondents.[3]

Further, the Louisiana Supreme Court's opinion in *Romero*, misapplied federal constitutional law. Petitioners submit that if this Court allows the *Romero* opinion to stand, the Louisiana Supreme Court and, necessarily, the lower courts will continue to misapply federal constitutional law in this already complex and confusing area to the detriment of many citizens.

CONCLUSION

For all the foregoing reasons this Court should reverse and remand this cause for trial in accordance with federal constitutional law.

Respectfully submitted,

HUNTER W. LUNDY, 8938*
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[3] Evidence of this is found in the Louisiana Supreme Court finding that "[r]eporter Hawkings made a good faith effort to research his facts." The depositions of reporter Hawkings are replete with inconsistencies in this regard. Also, Hawkings' testimony was inconsistent with other employees of *The Daily Advertiser*. All depositions were of record.

94-1105 (La. 1/17/95)

Alton ROMERO, M.D., and Janice Romero

v.

THOMSON NEWSPAPERS (WISCONSIN), INC., Thomson Southwest, Inc., Richard D'Aquin, Charles Lenox, Michael Spears and David Hawkings.

No. 94-CC-1105,

Supreme Court of Louisiana.

Jan. 17, 1995.

Obstetrician sued newspaper for defamation arising from article stating that Louisiana's women were being "butchered" by unnecessarily high Caesarean section rates, that hospital's rate was 57.5% of babies, and that this rate was attributable to fact that obstetrician was nearing retirement and only attended long-time patients who had previous children. The District Court denied newspaper's motion for summary judgment, and newspaper appealed. The Court of Appeal denied review, and certiorari was granted. The Supreme Court, Watson, J., held that story was constitutionally protected truthful speech on matter of public interest and concern.

Reversed, summary judgment granted.

Bob F. Wright, Gilbert H. Dozier, Domengeaux & Wright, for applicant.

Hunter W. Lundy, Winfield E. Little, Jr., Lundy & Dwight, Barbara D. Gibson, for respondent.

Mark D. Holton, Jack M. Weiss, III, for Louisiana Press Ass'n Amicus Curiae.

WATSON, Justice.[1]

This is a defamation suit in which plaintiffs, Dr. Alton Romero and his wife Janice, claim damages from various defendants because of an article published in *The Daily Advertiser*, a Lafayette, Louisiana newspaper. The issue is whether defendants [Thomson Newspapers (Wisconsin), Inc., Richard D'Aquin, Charles Lenox, Michael Spears and David Hawkings] are entitled to a summary judgment.

FACTS

In 1992, Ingrid VanTuinen and Dr. Sidney M. Wolfe published a report entitled "Unnecessary Cesarean Sections: Halting a National Epidemic," a research effort by the Public Citizen's Health Group. The report stated that there is no correlation between high Caesarean section rates and low infant mortality. Among 47 states and the District of Columbia, Louisiana had the third highest 1990 Caesarean section rate (27.3 percent). The hospital named with the highest Caesarean rate was Abrom Kaplan Memorial Hospital in Kaplan, Louisiana, with 57.5 percent. A news release summarized the reported data. Various newspapers picked up the news release,

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[1] Judge William Norris, III, Court of Appeal, Second Circuit, participating as Associate Justice Pro Tempore, in place of Associate Justice Pike Hall, Jr. Calogero, C.J., not on panel, Rule IV, § 3.

including the New Orleans *Times Picayune* and *The Los Angeles Times.*

David Hawkings, a *Daily Advertiser* reporter based in Washington, D.C., undertook writing the story and called Abrom Kaplan Memorial Hospital, as well as three other Louisiana hospitals mentioned in the report. Hawkings testified in deposition that he also called several state medical groups. The *Daily Advertiser* printed his story. In pertinent part, the article stated the following:

> State has high C-section rate
>
> 3 area hospitals among nation's highest
>
> *By David Hawkings*
>
> Advertiser Washington Bureau
>
> WASHINGTON – The Caesarean section rates at three hospitals, in the Lafayette area are among the nation's highest and at least triple what is medically necessary, a major consumer group reported Tuesday.
>
> After analyzing the records of 2,657 hospitals in 34 states, Public Citizen said the highest incidence of Caesareans it found anywhere was at Abrom Kaplan Memorial Hospital, Kaplan, where the surgery was used to deliver 57.5 percent of babies.
>
> * * *
>
> None of the hospitals disputed the figures for 1990. Abrom Kaplan and Women's and Children's attributed their high rates to a large number of repeat Caesarean patients. . . .
>
> Louisiana's 27.3 percent rate was the third-highest behind Nevada and Arkansas among

the 48 states surveyed by Public Citizen, founded by the consumer activist Ralph Nader. Half of the top 20 Caesarean rates in the study were in Louisiana hospitals.

"Louisiana's women are being butchered by their obstetricians in the way they do so many c-sections," said Dr. Sidney M. Wolfe, director of Public Citizen's Health Research Group. "The woman of Louisiana should be outraged and should start trying to do something about this."

* * *

The group estimated that "unnecessary" Caesarean surgeries added at least $1.3 billion to national health spending. The surgery nearly doubles the cost of a birth and increases the average hospital stay to four days.

"There are many valid reasons for a doctor to decide to perform a c-section, but too often the decision is made for reasons unrelated to the health of either the mother or child," said the study's author, Ingrid VanTuinen.

"Misdiagnosis and widely varying individual physician practice patterns play a part, along with factors of convenience, increased revenue for doctors and hospitals and the lingering fear of malpractice suits," she said.

The president of the Greater New Orleans Obstetrical and Gynecological Society, Dr. W. Ryckman Caplan, said Public Citizen had overstated the problem.

The administrator of the 40-bed Abrom Kaplan, Ray Landry, attributed that hospital's high rate to the only obstetrician at the hospital, Dr. Alton Romero. Romero is nearing retirement

> and only attends longtime patients who have had previous children – the category of woman most likely to have a Caesarean.[2]

Prior to writing the article, David Hawkings called Dr. Sidney Wolfe, who testified in deposition that the information in the article correctly reflected the research. Dr. Wolfe confirmed his statement that Louisiana's women were being butchered.

Ray A. Landry, administrator of Abrom Kaplan Memorial Hospital, testified in deposition that he had talked to Hawkings. Landry told Hawkings that the hospital had only one obstetrician, Dr. Romero, and that Dr. Romero's practice was limited. Landry did not say Dr. Romero was nearing retirement. Landry said he "referred to a practice that maybe was semi-retired".

Only the last portion of *The Daily Advertiser* article refers to Dr. Romero. He was, at the time, responsible for all deliveries at Abrom Kaplan Hospital. Dr. Romero contends that his Caesarean rate was 53.5 percent, not 57.5 percent, but concedes that over 50 percent of his deliveries were Caesareans. Dr. Romero was only forty-three and was not nearing retirement. Landry's description of Dr. Romero as having a limited, semi-retired practice gave an erroneous impression.

The trial court denied defendants' motion for summary judgment, and the Court of Appeal, Third Circuit, denied review. This Court granted certiorari to decide

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[2] David Hawkings, *State has high C-Section rate: 3 area hospitals among nation's highest. The Daily Advertiser,* May 13, 1992, at A-1; C-section A-5.

whether the trial court erred in denying defendants' motion for summary judgment. *Romero v. Thomson Newspaper (Wisconsin), Inc. et al,* 94-1105 (La. 5/20/94), 637 So.2d 473.

LAW

Since *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), the law of libel and slander has been delineated by federal constitutional law. Under the *New York Times* rule, a public official or figure must prove that a false statement was made with actual malice to recover for defamation. See *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967). Actual malice is demonstrated by a false statement made with knowledge of its falsity or with reckless disregard for the truth. There is authority for applying the *New York Times* rule when an article concerns public issues, even though the plaintiff is a private person. *Rosenbloom v. Metro Media, Inc.,* 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971).

When *The New York Times* standard applies, summary judgment should be granted for the speaker/writer unless there is clear and convincing evidence that a genuine issue of actual malice exists. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Failure to investigate does not present a jury question on whether the statements were published with malice, i.e., reckless disregard for the truth. *Beckley Newspapers Corp. v. Hanks,* 389 U.S. 81, 88 S.Ct. 197, 19 L.Ed.2d 248 (1967).

Speech on matters of public concern enjoys enhanced constitutional protection. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985). See *The Florida Star v. B.J.F.*, 491 U.S. 524, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989). Hyperbole, which could not reasonably be interpreted as stating actual fact, is protected. *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970).

A private figure plaintiff claiming defamation from a factual misstatement on a public issue cannot recover presumed or punitive damages without showing actual malice. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). Where a newspaper publishes public interest material, a private figure plaintiff cannot recover compensatory damages without showing that the statements are false and the media defendant was at fault. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986).

"[A] statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 at 20, 110 S.Ct. 2095 at 2706, 111 L.Ed.2d 1 at 18 (1990).

The standard by which a negligent publisher of defamatory falsehoods is liable to a private figure plaintiff for compensatory damages is left to state law. *Gertz*. The Louisiana Constitution guarantees freedom of the press in Article 1, § 7, as follows:

Freedom of Expression

> Section 7. No law shall curtail or restrain the freedom of speech or of the press. Every person may speak, write, and publish his sentiments on any subject, but is responsible for abuse of that freedom.

Truth is a defense, and it is sufficient if an allegedly libelous article is substantially true: unimportant details need not be accurate. *Otero v. Ewing,* 165 La. 398, 115 So. 633 (1927).

An expression of opinion on a matter of public concern, which does not imply a false fact, cannot be the basis of a defamation action. *Mashburn v. Collin,* 355 So.2d 879 (La.1977). An invasion of the right to privacy is only actionable when the published material is private, not when it is public and noteworthy. See *Jaubert v. Crowley Post-Signal, Inc.,* 375 So.2d 1386 (La.1979).

If a statement expresses an opinion, a defamation action must fail, unless the opinion implies a false and libelous fact and the opinion was expressed with actual malice. *Bussie v. Lowenthal,* 535 So.2d 378 (La. 1988).

Summary judgment is favored in defamation cases because lengthy litigation could have a chilling effect on freedom of the press. *Sassone v. Elder,* 626 So.2d 345 (La. 1993). To avoid summary judgment for defendants, plaintiffs have the burden of showing: either (1) a false factual statement and fault on the newspaper's part (*Philadelphia Newspapers, Inc. v. Hepps*); or (2) a statement of opinion on a matter of public concern which reasonably implies false

and defamatory facts and actual malice (*Mashburn v. Collin; Bussie v. Lowenthal*).

CONCLUSION

Dr. Romero was a private figure, practicing his profession without media attention or notoriety. However, the question of vaginal delivery versus Caesarean section delivery is a matter of national debate and a question of great public interest and concern. Dr. Romero was unfortunate in having his name thrown into that debate by Ray Landry. That misfortune does not give rise to an action for defamation.

Dr. Romero claims that he was accused of being a butcher. However, Dr. Wolfe was referring generally to all Louisiana obstetricians doing what he regarded as excessive Caesarean sections. His hyperbole was not directed at Dr. Romero. The statement of opinion did not reasonably imply any false and defamatory fact about Dr. Romero. *Milkovich; Mashburn v. Collin.* According to Dr. Wolfe, reporter Hawkings accurately reported their conversation. See *Greenbelt Cooperative Publishing Ass'n v. Bresler.* Dr. Wolfe's opinion was constitutionally protected speech. *Mashburn v. Collin.* There can be no recovery without proof of malice, even if there were a defamatory implication. *Bussie v. Lowenthal.* Dr Wolfe's statement was accurately reported, and there is no evidence of malice.

Plaintiffs have shown no false statements in *The Daily Advertiser's* article other than the reference to Dr. Romero as nearing retirement and a possible discrepancy in his Caesarean rate. The retirement statement was based on the reporter's conversation with Ray Landry. Reporter

Hawkings made a good faith effort to check his facts. The statement that Dr. Romero was nearing retirement, although not precise, had a reasonable basis because Landry described Dr. Romero as having a limited, semi-retired practice. Thus, Hawkings' report was substantially true. *Otero v. Ewing*. The Caesarean section rate was based on the published report, and the discrepancy claimed by Dr. Romero is insignificant. The newspaper also included the hospital's explanation: "a large number of repeat Caesarean patients."

The reported story caused Dr. Romero great anguish and apparently affected his medical practice. However, the inescapable fact is that the hospital where he performed all deliveries had the highest Caesarean rate among 34 states. Over 50 percent of his deliveries were Caesarean sections.

What *The Daily Advertiser* said about Dr. Romero was substantially true. Counsel could not pinpoint false statements in oral argument or brief. Since plaintiffs have failed to show false factual statements in the article, they cannot avoid summary judgment.

The Daily Advertiser story was constitutionally protected truthful speech on a matter of public interest and concern. Any unfortunate consequences to Dr. Romero flowing from the report are the price of a free and unfettered press.

DECREE

The trial court erred in not granting defendants' motion for summary judgment. Summary judgment in

favor of defendants is granted, dismissing plaintiffs' claims with prejudice.

REVERSED: SUMMARY JUDGMENT GRANTED.

LEMMON, J., concurs.

DENNIS, J., concurs with reasons.

DENNIS, Justice, concurring.

I respectfully concur in the judgment reversing the trial court and granting defendants' motion for summary judgment of this matter.

As this Court has recognized, the standard for summary judgment in a defamation action provides greater protection to defendants than in other types of action as a means of safeguarding free speech and press rights under our state constitution from the chilling effects brought on by unmeritorious litigation. *Sassone v. Elder,* 626 So.2d 345, 351 (La.1993); *see also Mashburn v. Collin,* 355 So.2d 879, 890-91 (La.1977) (proper application of summary judgment is essential to provide an effective tool for preventing unnecessary harassment of defendants by nonmeritorious actions threatening free speech). To survive a motion for summary judgment, a defamation plaintiff "must produce evidence of sufficient quality and quantity to demonstrate that he likely will be able to meet his burden of proof at trial." *Sassone, supra,* at 351.

The newspaper article at issue in this case concerns the medical treatment of women in this country and, in particular, in this state. This topic is clearly a matter of great public concern and interest. I believe that our state constitution incorporates the standard articulated by a plurality of the U.S. Supreme Court in *Rosenbloom v.*

Metromedia, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971), *overruled sub silentio by Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), which applies the *New York Times* actual malice test to speech of public concern regardless of the status of the plaintiff. *See Sassone, supra* at 356 (concurring opinion). Consequently, the plaintiffs here must produce evidence to demonstrate the likelihood that they will be able to show by clear and convincing evidence that the article was published with knowing and reckless disregard of its falsity. *Id.* (concurring opinion); *Mashburn, supra* at 890 (La.1977). Because I do not find that the plaintiffs have met that burden here, I agree that summary judgment in favor of the defendants is appropriate.

ALTON ROMERO, M.D. and JANICE ROMERO	15TH JUDICIAL DISTRICT COURT
VERSUS	DOCKET NUMBER: 92-61804-J
THOMSON NEWSPAPERS (WISCONSIN), INC., THOMSON SOUTHWEST, INC., RICHARD D'AQUIN, CHARLES LENOX, and DAVID HAWKINS	VERMILION PARISH, LOUISIANA

JUDGMENT

The Motion for Summary Judgment came on the 14th day of April, 1994, to be heard.

The Court, having heard the pleadings, evidence and arguments of counsel, and considering the law and the evidence to be in favor of Plaintiffs,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the Plaintiffs, ALTON ROMERO, M.D. AND JANICE ROMERO, and against the Defendants, THOMSON NEWSPAPERS (WISCONSIN), INC., THOMSON SOUTHWEST, INC., RICHARD D'AQUIN, CHARLES LENOX, AND DAVID HAWKINS, denying defendants' Motion for Summary Judgment.

Judgment read, rendered and signed this 21st day of April, 1994.

/s/ E. Woody Thompson
JUDGE

1171M

IN THE CIVIL DISTRICT COURT
OF THE FIFTEENTH JUDICIAL DISTRICT
IN AND FOR THE PARISH OF VERMILION
STATE OF LOUISIANA

* *

ALTON ROMERO, M.D.
AND JANICE ROMERO

VERSUS

CIVIL DOCKET NO.
92-61804

THOMSON NEWSPAPERS,
ET AL.

* *

The above-captioned case came up for hearing as a special fixing at the Lafayette Parish Courthouse, Lafayette, Louisiana, before the Honorable Ellis W. Thompson, Judge Pro Tempore of the above-styled court, on April 14, 1994, pursuant to notice.

APPEARANCES:

FOR THE PLAINTIFFS:
WINFIELD E. LITTLE, JR.
HUNTER W. LUNDY
DEANN GIBSON

FOR THE DEFENDANTS:
BOB F. WRIGHT
GILBERT H. DOZIER

THE COURT: Just one moment, please, would you. The arguments are just as clear and concise as the memos that you filed in this matter, and the Court, of course, realizes the very serious nature of the issue that's before it. The Court's aware that in arguing a defamation

action, the standard of a Motion for Summary Judgment is different from the ordinary run of the mill Motion for Summary Judgment. In other words, the – it's more relaxed than from an ordinary tort, in that usually in a tort Motion for Summary Judgment the mover has the burden of proof by clear and convincing evidence that there's no material fact at issue.

The Court is aware of the elements of libel of tort that must be proved, and obviously in a defamation by the news media suit, the constitutionally protected freedom of speech is interjected and, thus, the Plaintiff instead of the mover – and the Court discerns it must produce evidence that is of sufficient quality and quantity to demonstrate that Plaintiff will be able to meet his burden of proof at the trial.

Considering the offerings that have been made, together with the argument, the Court is satisfied that the position of the Plaintiff in this matter is the proper one and, therefore, the Motion for Summary Judgment is denied.

No. W94-532

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

Filed: APR. 21 1994, 19___
/s/ Barbara Cox
Clerk

ALTON ROMERO, M.D. and JANICE ROMERO

VERSUS

THOMSON NEWSPAPER (WISCONSIN), INC., ET AL.

In Re THOMSON NEWSPAPERS (WISCONSIN), INC., ET AL. Applying for **Certiorari,** or writ of review, to the 15th Judicial District Court, Parish of VERMILION 92-61804-J State of Louisiana.

DOMENGEAUX, WRIGHT (GILBERT H. DOZIER/BOB F. WRIGHT)
LAFAYETTE, LA.
Attorneys for Applicant.

HUNTER WILLIAM LUNDY,
LAKE CHARLES, LA.
Attorneys for Respondents.

April 29, 1994
Lake Charles, La.

STAY DENIED.

WRIT DENIED: We find no error in the trial court's ruling.

/s/ H. L. Y.
H. L. Y.

/s/ U. G. T.
U. G. T.

/s/ B. C. W.
B. C. W.

THE DAILY ADVERTISER

LAFAYETTE, LA., WEDNESDAY, MAY 13, 1992

State has high C-section rate

3 area hospitals among nation's highest

By David Hawkings
Advertiser Washington Bureau

WASHINGTON – The Caesarean section rates at three hospitals in the Lafayette area are among the nation's highest and at least triple what is medically necessary, a major consumer group reported Tuesday.

After analyzing the records of 2,657 hospitals in 34 states, Public Citizen said the highest incidence of Caesareans it found anywhere was at Abrom Kaplan Memorial Hospital, Kaplan, where the surgery was used to deliver 57.5 percent of babies.

Abbeville General Hospital had a Caesarean rate of 44.7 percent, ranking 18th on the national list. And Women's and Children's Hospital in Lafayette ranked 79th with a Caesarean rate of 38.5 percent.

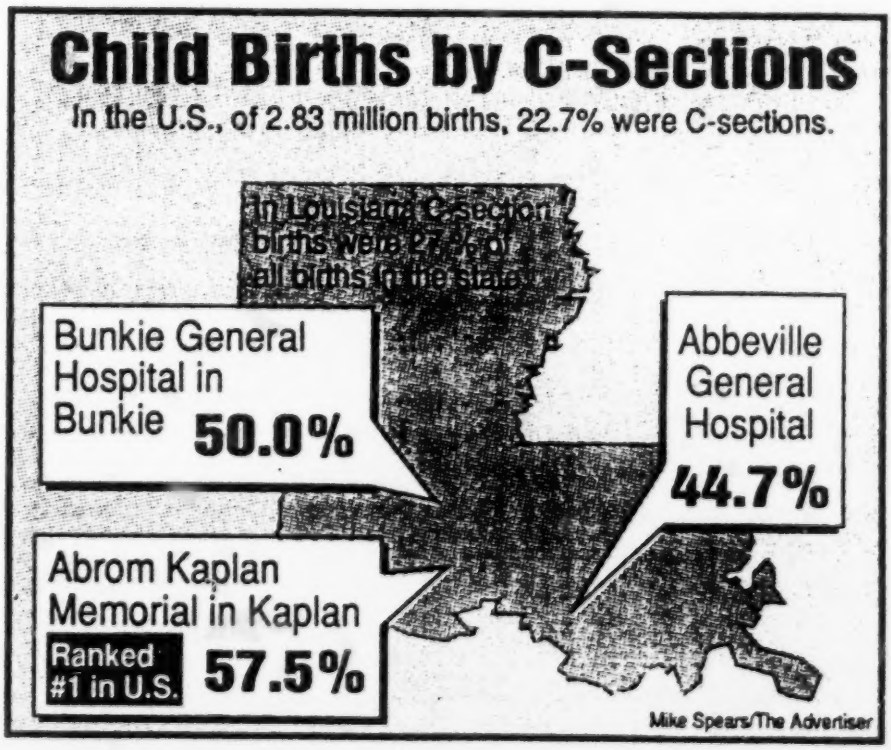
But the lowest Caesarean rate in the state was also in Lafayette: 5.4 percent at University Medical Center.

None of the hospitals disputed the figures for 1990. Abrom Kaplan and Women's and Children's attributed their high rates to a large number of repeat Caesarean patients. Abbeville declined to comment.

Louisiana's 27.3 percent rate was the third-highest behind Nevada and Arkansas among the 48 states surveyed by Public Citizen, founded by the consumer activist Ralph Nader. Half of the top 20 Caesarean rates in the study were in Louisiana hospitals.

"Louisiana's women are being butchered by their obstetricians in the way they do so many c-sections," said Dr. Sidney M. Wolfe, director of Public Citizen's Health Research Group. "The woman of Louisiana should be outraged and should start trying to do something about this."

But the study's authors, and various health experts in Louisiana, said there was no evidence to explain the state's large number of hospitals with unusually high Caesarean rates.



None of the possibilities they suggested is unique to the state: a large indigent population, which generally gets poor prenatal care; a large number of rural hospitals, where staffing and equipment lapses can prompt doctors to avoid long labors; a high average age of physicians, because older doctors tend to perform more Caesareans; and a cultural preference for women to always have Caesareans once their first child is born that way.

The national rate was 22.7 percent two years ago, three-tenths of a percent less than in 1989, according to the study. Public Citizen hailed this as the first significant drop in a generation and said: "The epidemic of Caesarean surgery seems to have turned the corner."

But many doctors, patients, insurance companies and other health care officials believe the rate is still unnecessarily high. The consumer group noted that if the national rate were 12 percent, almost half the 982,000 babies born by Caesarean two years ago would have been delivered vaginally.

Public Citizen used the 12 percent rate that is advocated by Dr. Edward Quilligan, medical school dean of the University of California at Irvine and editor of the American Journal of Obstetrics and Gynecology.

The group estimated that "unnecessary" Caesarean surgeries added at least $1.3 billion to national health spending. The surgery nearly doubles the cost of a birth and increases the average hospital stay to four days.

"There are many valid reasons for a doctor to decide to perform a c-section, but too often the decision is made

for reasons unrelated to the health of either the mother or child," said the study's author, Ingrid VanTuinen.

"Misdiagnosis and widely varying individual physician practice patterns play a part, along with factors of convenience, increased revenue for doctors and hospitals and the lingering fear of malpractice suits," she said.

The president of the Greater New Orleans Obstetrical and Gynecological Society, Dr. W. Ryckman Caplan, said Public Citizen had overstated the problem.

The administrator of the 40-bed Abrom Kaplan, Ray Landry, attributed that hospital's high rate to the only obstetrician at the hospital, Dr. Alton Romero. Romero is nearing retirement and only attends longtime patients who have had previous children – the category of women most likely to have a Caesarean.

A spokeswoman for the 93-bed Women's and Children's, Mary Beth McDonald, said at least half the patients there are women electing to have repeat Caesareans, even though the hospital policy is to encourage these women to attempt vaginal deliveries.

The administrator at Abbeville General, Felix Fraraccio, did not return three calls over two days seeking comment.

The Public Citizen study said that nationally, hospitals with neonatal intensive care units had the same Caesarean rate as hospitals without. It said for-profit hospitals had the highest rate, 30.5 percent. The nonprofit hospital average was 23 percent, while the average was 21.4 percent at government hospitals. Of the hospitals in

the Lafayette area, the two in Vermillion Parish are public, as is University Medical Center. Women's and Children's is part of a for-profit chain.

Only one in five American babies is delivered vaginally to a mother who first gave birth through Caesarean section. Four years ago the American College of Obstetricians and Gynecologists said that in the absence of medical complications, women who previously had Caesareans should be encouraged to try vaginal deliveries after later pregnancies.

The other top reasons for Caesarean surgery are when a baby's head is too big for the mother's pelvis, when its feet or buttocks are in position to be delivered first or when it is having difficulty breathing.

Public Citizen called its study the most thorough to date of Caesarean sections, because it was based on statewide records from 48 states, 34 of which also volunteered records on each of their hospitals.

Using a much smaller sample, the federal Department of Health and Human Services has estimated, the Caesarean rate dropped to 23.5 percent in 1990, also down three-tenths of a percent from the year before.

The national rate was 5.5 percent in 1970.

Supreme Court, U.S.
FILED
MAY 22 1995
OFFICE OF THE

No. 94-1712

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ALTON ROMERO, M.D., *et al.*,
Petitioners,

v.

THOMSON NEWSPAPERS (WISCONSIN), INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Louisiana

---

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Louisiana Supreme Court violate federal constitutional law when it granted summary judgment against a defamation plaintiff who was unable to show material falsehood?

PARTIES AND LIST PURSUANT TO RULE 29.1

The parties are as stated at Pet. Cert. ii. Respondent Thomson Newspapers (Wisconsin), Inc. is a Delaware corporation that is the successor to a formerly existing corporation, respondent Thomson Southwest, Inc. Both were and are wholly owned through intermediate wholly-owned corporate entities by The Thomson Corporation, a publicly held Ontario corporation.

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Constitutional Provisions:

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Statute:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1712

ALTON ROMERO, M.D., *et al.*,
Petitioners,

v.

THOMSON NEWSPAPERS (WISCONSIN), INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Louisiana

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BRIEF IN OPPOSITION

Respondents respectfully pray that the petition for a writ of certiorari to the Supreme Court of Louisiana be denied.

OPINIONS BELOW

The opinion of the Supreme Court of Louisiana is reported at 648 So. 2d 866 and is reproduced at P.C.A. 1. The Civil District Court of the Fifteenth Judicial District and the Court of Appeal of Louisiana, Third Circuit, did not issue opinions; their orders are reproduced at P.C.A. 13 and 16, respectively.

JURISDICTION

The judgment of the Supreme Court of Louisiana was entered January 17, 1995. P.C.A. 1. The petition for certiorari was filed April 17, 1995, and received by counsel for respondents on or after April 20, 1995. The

jurisdiction of this Court is invoked under 28 U.S.C. § 1257. This Court lacks jurisdiction because the decision rests on an independent and adequate state ground, as is discussed *infra* pp. 6-7. *Fox Film Corp.* v. *Muller*, 296 U.S. 207 (1935); *Murdock* v. *City of Memphis*, 20 Wall. 590 (1875).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of Louisiana, Article I, § 7, provides:

> "No law shall curtail or restrain the freedom of speech or of the press. Every person may speak, write, and publish his sentiments on any subject, but is responsible for abuse of that freedom."

The First and Fourteenth Amendments to the Constitution of the United States are reproduced in part at Pet. Cert. 1-2.

STATEMENT

An article in the Lafayette, Louisiana *Daily Advertiser* on May 13, 1992, reported a study by Public Citizen's Health Research Group of the incidence of Caesarean section deliveries at 2,657 hospitals in 34 states throughout the country. As the article reported, the study found that the highest rate in any of those 2,657 hospitals was at Abrom Kaplan Memorial Hospital in Kaplan, Louisiana, where the study said 57.5% of babies were delivered by Caesarean surgery, compared to a national rate of 22.7%. The article also quoted comments on these results: by the director of the study, that "Louisiana's women are being butchered by their obstetricians in the way they do so many c-sections," P.C.A. 4; and by the president of the Greater New Orleans Obstetrical and Gynecological Society, that "Public Citizen had overstated the problem." *Id.*

The seventeenth paragraph of the article mentioned petitioner. The article reported that when asked about the study, the administrator of Abrom Kaplan Memorial Hospital

> "attributed that hospital's high rate to the only obstetrician at the hospital, Dr. Alton Romero. Romero is nearing retirement and only attends long-time patients who have had previous children—the category of women most likely to have a Caesarean." P.C.A. 4-5, 20.

Dr. Romero and his wife, petitioners here, sued in Louisiana state court for defamation. Respondents—the publisher, reporter, and others employed at *The Daily Advertiser*—moved for summary judgment. The court denied the motion and a state intermediate appellate court denied review. P.C.A. 13, 16. The Supreme Court of Louisiana reversed and ordered that summary judgment for respondents be granted. P.C.A. 10-11.

The Supreme Court pointed out, P.C.A. 9, that petitioners had identified only two statements in the article that could be challenged as not precisely true:

1. Dr. Romero's Caesarean rate, he said, was 53.5% of births, not 57.5%. P.C.A. 5.

2. Dr. Romero was not, he said, nearing retirement in 1992, although concededly the hospital administrator had told the reporter that Dr. Romero's practice "maybe was semi-retired." P.C.A. 5.

The Supreme Court of Louisiana held that:

> "Plaintiffs have shown no false statements in *The Daily Advertiser's* article other than the reference to Dr. Romero as nearing retirement and a possible discrepancy in his Caesarean rate.
>
> * * *
>
> "What *The Daily Advertiser* said about Dr. Romero was substantially true. Counsel could not pinpoint false statements in oral argument or brief. Since plaintiffs have failed to show false factual state-

ments in the article, they cannot avoid summary judgment."

P.C.A. 9-10. "*The Daily Advertiser* story was constitutionally protected *truthful* speech on a matter of public interest and concern." *Id.* at 10 (emphasis supplied).[1]

REASONS FOR DENYING THE WRIT

The Supreme Court of Louisiana held, with ample basis, that the article was not actionable because it contained no material defamatory falsehood. P.C.A. 10. Whether tested under the First and Fourteenth Amendments, or under Louisiana's own constitution and law of defamation, the complaint for that reason failed. The Louisiana Supreme Court gave Dr. Romero the benefit of treatment as a private figure, P.C.A. 9, and it also agreed with him that opinion was not entitled to protection if it implied a false statement. P.C.A. 8. He lost, not because he was subjected to too demanding a standard, but because he could not show that any material statement about himself in the article was untrue. P.C.A. 10.

On this record, the decision clearly was not only consistent with, but compelled by, the First and Fourteenth Amendments to the Constitution of the United States.

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[1] The Supreme Court added:

"The retirement statement was based on the reporter's conversation with Ray Landry [the hospital administrator]. Reporter Hawkings made a good faith effort to check his facts. The statement that Dr. Romero was nearing retirement, although not precise, had a reasonable basis because Landry described Dr. Romero as having a limited, semi-retired practice. Thus, Hawkings' report was substantially true. *Otero v. Ewing* [165 La. 398, 115 So. 633 (1927)]. The Caesarean section rate was based on the published report, and the discrepancy claimed by Dr. Romero is insignificant. The newspaper also included the hospital's explanation: 'a large number of repeat Caesarean patients.'"

P.C.A. 9-10.

Moreover, it is fully sustainable based on the Louisiana Supreme Court's construction of the requirement of material falsity that is part of Louisiana's defamation law and the free-press guarantee of the Constitution of Louisiana. That construction of Louisiana law is not subject to review in this Court.

I. THE COURT CORRECTLY HELD THAT PETITIONERS COULD NOT RECOVER WHEN THEY FAILED TO SHOW MATERIAL FALSEHOOD.

The defamatory falsehood to which petitioner claimed he was subjected was that instead of delivering 57.5% of his patients' babies by Caesarean section, as the article reported, the correct figure was 53.5%—compared to a national average which he did not challenge of about 22.7%. It is difficult to take such a quibble seriously. The Supreme Court of Louisiana not surprisingly held this difference inconsequential as a matter of law. P.C.A. 10. It also held "substantially true" the reference to Dr. Romero's being near retirement. P.C.A. 10. The report that the director of the study had referred to Louisiana women as being "butchered" by obstetricians performing excessive numbers of Caesareans, the Supreme Court held, was accurately reported, was hyperbole not directed particularly at Dr. Romero, and did not imply a falsehood. P.C.A. 9. *Cf. Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 20 (1990) ("a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection").

Under the First and Fourteenth Amendments, "a private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant." *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U.S. 767, 777 (1986). Moreover, the defamation laws of the states, like Louisiana's, would preclude any other result. "The common law of libel takes but one approach to the ques-

tion of falsity . . . . It overlooks minor inaccuracies and concentrates upon substantial truth." *Masson* v. *New Yorker Magazine, Inc.*, 501 U.S. 496, 516 (1991).

II. THE DECISION RESTS ON LOUISIANA LAW.

The Louisiana Supreme Court held that Louisiana law provides that "[t]ruth is a defense" and "unimportant details need not be accurate." P.C.A. 8, citing *Otero* v. *Ewing*, 165 La. 398, 115 So. 633 (1927). It also explicitly relied on the free-press guarantee of Article I, § 7, of the state constitution. It explained in detail the restrictions Louisiana law places on defamation actions, and that under Louisiana's free press guarantee "[s]ummary judgment is favored" in such cases. P.C.A. 8.

The Louisiana Supreme Court's holding, citing a 1927 Louisiana case that relied only on state law, that "[t]ruth is a defense," P.C.A. 8, is certainly an adequate and independent state ground. The Louisiana court's legal discussion understandably opened by briefly reviewing the line of cases after *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), to explain the federal constitutional restraints on state defamation actions, observing that "[s]ince *New York Times Co.* v. *Sullivan* . . . the law of libel and slander has been delineated by federal constitutional law." P.C.A. 6. But after providing that context, it explained that for a private figure, which it held Dr. Romero to be, P.C.A. 9, state law had greater leeway:

> "The standard by which a negligent publisher of defamatory falsehoods is liable to a private figure plaintiff for compensatory damages is left to state law. *Gertz* [v. *Robert Welch, Inc.*, 418 U.S. 323 (1974)]. The Louisiana Constitution guarantees freedom of the press in Article I, § 7 . . . ."

P.C.A. 7. The opinion accordingly turned to the applicable Louisiana constitutional and defamation law. Citing and quoting Article I, § 7, of the Louisiana Constitution, it held that in Louisiana:

—"Truth is a defense, and it is sufficient if an allegedly libelous article is substantially true; unimportant details need not be accurate" P.C.A. 8, citing *Otero* v. *Ewing*, 165 La. 398, 115 So. 633 (1927).

—"An expression of opinion on a matter of public concern, which does not imply false fact, cannot be the basis of a defamation action." P.C.A. 8, citing *Mashburn* v. *Collin*, 355 So. 2d 879 (La. 1977).

—"If a statement expresses an opinion, a defamation action must fail, unless the opinion implies a false and libelous fact and the opinion was expressed with actual malice." P.C.A. 8, citing *Bussie* v. *Lowenthal*, 535 So. 2d 378 (La. 1988).

—"Summary judgment is favored in defamation cases . . . ." P.C.A. 8, citing *Sassone* v. *Elder*, 626 So. 2d 345 (La. 1993).

Thus Louisiana law compels the result in this case, just as would the First and Fourteenth Amendments. The Louisiana court's explicit reliance on state law was clearly enough an independent and adequate basis for the decision, and one this Court will not review. *Michigan* v. *Long*, 463 U.S. 1032 (1983); *Fox Film Corp.* v. *Muller*, *supra*. "By its very definition the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law." *Harris* v. *Reed*, 489 U.S. 255, 264 n.10 (1989).

Indeed, rather inconsistently with their attempt to characterize this as a federal-law decision, petitioners acknowledge and criticize the state supreme court's holding on Louisiana defamation law as exceeding First and Fourteenth Amendment requirements. They complain of what they call "the Louisiana Supreme Court's disdain for defamation cases," P.C.A. 12, and contend that Lou-

isiana's protection of the press by summary judgment "CIRCUMVENTS FEDERAL CONSTITUTIONAL LAW." Pet. Cert. 11. They object that

> "the Louisiana Supreme Court has fashioned a separate dichotomy for motions for summary judgment in defamation cases as a way of circumventing federal constitutional law when it suits its purposes."

Pet. Cert. 15-16. Petitioners are correct that Louisiana law does place a higher burden on plaintiffs in defamation cases than it does in other state civil cases, as the Louisiana court pointed out in one of its earlier decisions that it cited. See *Sassone, supra,* 626 So. 2d at 352. However, the standard Louisiana has adopted for defamation cases, petitioners elsewhere acknowledge, "is essentially the standard set forth in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)." Pet. Cert. 14; see also *Sassone, supra,* 626 So. 2d at 351. And even if Louisiana chose to grant greater protection to the press than the minimums the federal Constitution requires, the Constitution does not prohibit it from doing so. Indeed, many states have established protections for the press that exceed those of the U.S. Constitution.[2] Louisiana's holding that summary judgment should be granted because

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[2] For example, states have placed on defamation plaintiffs a higher burden than is required by this Court's decisions. See, e.g., *Sisler* v. *Gannett Co.*, 104 N.J. 256, 516 A.2d 1083, 1091-93 (1986) (adopting "actual malice" standard where statement involves a matter of public concern and private-figure plaintiff "has voluntarily and knowingly" engaged in conduct implicating legitimate public interest); *Diversified Management, Inc.* v. *Denver Post, Inc.*, 653 P.2d 1103, 1106 (Colo. 1982) (adopting "reckless disregard" test of *St. Amant* v. *Thompson*, 390 U.S. 727, 730-31 (1968) for private-figure cases involving matters of public or general concern); *Chapadeau* v. *Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 199, 341 N.E.2d 569, 571-72 (1975) (adopting "gross irresponsibility" standard of fault where article about private figure "is arguably within the sphere of legitimate public concern").

substantial truth is a defense does not call for review under the discretionary jurisdiction of this Court.

III. NO MISAPPLICATION OF FEDERAL LAW OCCURRED.

Ignoring the court's holding under state law that the article is "substantially true," P.C.A. 10, petitioners argue that the court ruled against them by misapplying federal constitutional law. In numerous respects, that assertion is incorrect.

First, as set forth above, the court ruled that the petitioners could not demonstrate falsity as required under Louisiana law. Second, the court correctly ruled that state law governs the extent of protection to be given a publisher writing about a private plaintiff beyond the minimum protection required by *Gertz*. P.C.A. 7. Third, the court defined the showing to be made by a private-figure plaintiff under state law: "either (1) a false factual statement and fault on the newspaper's part (*Philadelphia Newspapers, Inc.* v. *Hepps*); or (2) a statement of opinion on a matter of public concern which reasonably implies false and defamatory facts and actual malice (*Mashburn* v. *Collin; Bussie* v. *Lowenthal*)." P.C.A. 8-9. And fourth, it ruled that petitioners had failed as to each element, both because the article was "substantially true" and also because even if it had been materially false, petitioners had failed to demonstrate the degree of fault required under state law. Apart from the state-law ruling on substantial truth, the separate and independent ruling on fault also was based on state, not federal constitutional, law.

In short, the state court invoked the federal Constitution to set forth the minimum protection required for a media defendant, and then looked to state law for additional protections. What petitioners in essence are asserting is that Louisiana may not, as a matter of law, provide protection to publishers beyond that provided

by the federal Constitution—a contention that is plainly without merit.[3] But because the Louisiana court ruled also that the article was "substantially true" as to petitioners, that issue, even if in dispute, is not presented. The court's determination of state law, and application of that law to the facts to hold that "truthful speech on a matter of public interest and concern," is "constitutionally protected," P.C.A. 10, does not warrant review by this Court.

CONCLUSION

For the reasons stated, certiorari should be denied.

Respectfully submitted,

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May 22, 1995

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[3] See *Gertz, supra,* 418 U.S. at 347 (holding that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual"); see also cases cited at note 2, *supra.*